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Supreme Court, U.S.
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No. 02-1433

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID RAY HARRIS,
Petitioner,

v.

JANIE COCKRELL, Director,
Texas Department of Criminal Justice,
Institutional Division
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

GREG ABBOTT
Attorney General of Texas

BARRY R. McBEE
First Assistant Attorney General

JAY KIMBROUGH
Deputy Attorney General
For Criminal Justice

*GENA BUNN
Chief, Postconviction
Litigation Division

P. O. Box 12548
Capitol Station
Austin, Texas 78711
(512) 936-1600
FAX# (512) 320-8132

ATTORNEYS FOR RESPONDENT

* Counsel of Record

37 pp

CAPITAL CASE

QUESTIONS PRESENTED

1a. Whether the federal district court impermissibly ignored presumptively correct state court findings of fact to find deficient performance of counsel at the punishment phase, particularly in light of Harris' unwillingness to cooperate with and assist counsel in preparing for the punishment phase, his explicit instructions that counsel focus on the guilt-innocence phase, and his refusal to allow counsel to present evidence concerning his family.

1b. Whether, in any event, the court of appeals correctly determined that Harris was not prejudiced by trial counsel's failure to present the identified mitigating evidence in light of the relative weakness of the evidence.

2. Whether the admission of testimony at punishment regarding Harris' prior arrest for attempted burglary and subsequent kidnapping charge was constitutionally permissible, when Harris was ultimately convicted of robbery, burglary and attempted burglary but acquitted of kidnapping.

3. Whether the punishment charge – which included a special issue regarding provocation by the victim – allowed jury consideration of evidence that the victim shot first.

4. Whether the punishment charge allowed jury consideration of evidence of alcoholism and intoxication as presented at trial.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In 1986, Harris was convicted by a jury of capital murder and sentenced to death for murdering Mark Mays during the course of committing or attempting to commit kidnapping of Mays' girlfriend. After unsuccessfully challenging his conviction and sentence in state direct appeal and habeas corpus proceedings, Harris filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 in federal district court. Despite the existence of presumptively correct state court fact findings disposing of Harris' claims of constitutional error, the federal district court conducted two evidentiary hearings and ultimately, more than nine years after Harris' petition was filed, granted Harris habeas relief as to punishment on two claims. The Fifth Circuit Court of Appeals reversed the district court's judgment granting relief on those claims and affirmed the judgment as to three claims cross-appealed by Harris. Harris now seeks certiorari review of the Fifth Circuit's judgment. Harris, however, does not present a compelling reason for this Court to review his claims and certiorari review should be denied.

STATEMENT OF THE CASE

I. Facts of the Crime

In the pre-dawn hours of September 1, 1985, Harris broke into the apartment of Mark Mays in Beaumont, Texas, as Mays and his girlfriend, Roxanne Lockard, slept. Harris, armed with a .38 caliber revolver, made his way to the bedroom occupied by Mays and Lockard and awakened them. He instructed Mays to get out of bed and lock himself in a hallway bathroom, which he did. He directed Lockard to get out of bed and put on some clothes, which she did. He then led Lockard out the back door of the apartment at gunpoint and directed her to get into his pickup truck, which was parked in a driveway behind the apartment.

About that time, Mays exited the back door of the apartment and stood in front of Harris' truck with a gun in his hands. Lockard testified at trial that she then heard gunfire but that she could not determine who fired first because she immediately took cover. She got out of the truck and did not see Harris, but she did see Mays in front of the truck,

partially bent over "like he was throwing up." Realizing Mays had been shot, Lockard ran inside the apartment complex to find someone to call the police and an ambulance.

Police found Mays lying in a pool of blood with his gun underneath him. An autopsy revealed he died from multiple gunshot wounds, two of which were fatal.[1] A trace metal test came back positive for both of Mays' hands, and there was evidence he shot his gun at least four times.

According to Harris, Mays shot first, hitting Harris first in the neck then in the shoulder, before Harris ducked behind the door of his truck and began shooting at Mays. After shooting Mays several times, Harris ran to the front of the truck where he saw Mays on his hands and knees and shot him one last time, this time from about ten feet away.[2] Harris then got into his truck and drove away.

II. Pretrial Preparations and Development of Trial Strategy

Harris played an active role in the preparation of his case for trial. The testimony is uncontroverted that it was Harris' chosen strategy to present a defense of voluntary manslaughter at the guilt-innocence phase of trial, and he instructed trial counsel to focus their efforts on winning at the guilt-innocence phase. 6 R 133, 144, 179; 5 R 95-96.[3] Indeed, as trial counsel Dennis Powell testified and Harris himself acknowledged, Harris informed his attorneys that if he lost at guilt-innocence and was convicted of capital murder, he would rather be sentenced to death than serve a life sentence in prison. *Id.* Harris, in fact, specifically instructed his attorneys not to seek a plea bargain with the State, and in conformity with those instructions, trial counsel did not engage in plea negotiations. 6 R 218; 5 R 96; *see also* 5 R 64-65.

Nevertheless, trial counsel did conduct some preliminary investigation into Harris' background. Dennis Powell spoke with Harris' mother on several occasions and asked her to write a statement

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[1]Mays had gunshot wounds on both arms, his right shoulder, which wound was disabling, and his face. He also had two wounds to his chest area which were fatal.

[2]However, a forensic pathologist testified that the stippling on Mays' body indicated that the muzzle of the gun was within twelve to twenty-four inches of his body when one of the fatal shots was fired.

[3]"R" refers to the record on appeal in the instant federal habeas corpus proceeding, volumes 5, 6 and 9 of which contain the transcribed testimony of witnesses at the evidentiary hearings conducted in federal district court.

for him describing Harris' childhood and their family background. Ann Harris testified that she, in fact, provided Powell with a very lengthy description of Harris' background. 6 R 31-32. Harris' mother also gave Powell "literally boxes of stuff" pertaining to Harris' background, including school records, employment records, and other "memorabilia," which trial counsel reviewed. 6 R 123. Trial counsel obtained Harris' school records from his mother and had reviewed the records from Harris' prior incarceration in California, which had been obtained by the State prior to trial. 6 R 123, 152, 173-175, 212.

Whenever trial counsel attempted to bring up the subject of punishment-phase evidence, however, Harris told them he was not interested in presenting additional evidence at the punishment phase. 6 R 94, 123, 130, 179. Trial counsel spoke with Harris concerning this issue on several occasions and repeatedly attempted to explain to Harris the importance of presenting mitigating evidence at the punishment phase, but Harris steadfastly refused to aid trial counsel in identifying potential sources of mitigating evidence and instructed them to focus solely on the guilt-innocence phase. 6 R 130-132, 144, 148, 179.

In addition to his general instructions regarding the punishment phase, Harris also specifically instructed his attorneys not to call his family members to the stand and not to present evidence regarding his family background. It is uncontroverted that evidence of Harris' family history was strictly "off-limits" to trial counsel during his 1986 trial. 6 R 121, 128-131, 147-148, 178-180 (Dennis Powell); 6 R 201, 205, 217-218 (Clay Dugas); 6 R 31-32 (Ann Harris); 5 R 97, 104-105 (David Harris). Even when trial counsel strongly advised him on several occasions to allow them to present this evidence, Harris adamantly refused. 6 R 178-179. As Dennis Powell testified, "[M]y understanding was, David didn't fault his family for what had happened and he didn't feel like he ought to drag his family into it." 6 R 180.

III. Guilt-Innocence Phase

Harris took the stand in his own behalf at the guilt-innocence phase of his trial. He admitted that he broke into Mays' apartment, but he claimed that he only intended to burglarize it.[4] He testified that he took

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[4]However, Harris could not explain on cross-examination why he failed to notice a videocassette recorder, jewelry, and other valuable items in the living room of the apartment and headed directly to the bedroom occupied by Mays and Lockard.

the gun only because he thought "it would avoid anybody from getting hurt." According to Harris, Mays and Lockard were awakened not by Harris' flashlight shining in their eyes, as Lockard had testified, but by the hall light when Harris opened the door to their bedroom. Harris claimed that when he saw Mays and Lockard in the bedroom, he tried to close the door, but they were already awake. Because Mays was acting "jumpy" and Harris feared he might attack him, Harris "used" Lockard to safely get out of the apartment. Harris claimed that he shot Mays only after Mays shot him first. He testified that he was scared during the exchange of gunfire with Mays and that he thought Mays was trying to kill him.

However, Harris told police shortly after his arrest that he was "looking for a piece" when he entered Mays' apartment and that Mays "acted crazy" but never threatened him. He also told police that his first shot at Mays missed, so he fired two more times, but Mays was still moving so he fired once more to "finish[] him off."

The jury was instructed at the guilt-innocence phase on the primary offense of capital murder and the lesser included offense of voluntary manslaughter, defined as "caus[ing] the death of an individual under circumstances that would constitute murder except that he caused the death under the immediate influence of sudden passion arising from an adequate cause."[5] The jury found Harris guilty of capital murder.

IV. Punishment Phase

At the punishment phase, the State presented evidence of numerous prior offenses committed by Harris, both adjudicated and unadjudicated, including burglaries, assaults, and robberies. Harris was court-martialled, dishonorably discharged from the Army, and sentenced to confinement as a result of a series of burglary and theft offenses he

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[5]Harris objected to the charge at trial and argued on direct appeal that the application paragraph on capital murder failed to require the State to disprove that he acted as a result of sudden passion arising from an adequate cause and thereby impermissibly shifted the burden of proof on this issue to him since the sudden passion "element" was submitted only in the application paragraph on voluntary manslaughter. The Texas Court of Criminal Appeals held that because Mays was acting in Lockard's defense and/or to prevent her kidnapping, Harris was not even entitled to a jury charge on voluntary manslaughter; therefore, it found it unnecessary to decide whether the charge as submitted was flawed. *Harris v. State*, 784 S.W.2d 5, 9-10 (Tex. Crim. App. 1989).

committed while stationed in Germany. He was also convicted of robbery, burglary, and two counts of attempted burglary and sentenced to six and a half years in the California Department of Corrections. He was convicted of possession of a deadly weapon by a prisoner while incarcerated in California and was sentenced to an additional two years.

The State also presented evidence concerning Harris' involvement in the 1976 murder of a Dallas police officer, for which Randall Dale Adams was convicted and sentenced to death. Harris admitted to police officers that he had bragged about being the triggerman because it enhanced his reputation as a bad, tough person. Harris was not charged in connection with the offense, and he testified at Adams' trial that Adams shot and killed the police officer.[6]

There was also evidence that Harris attempted to escape from the detention center where he was being held pending his capital murder trial. Finally, responding to a hypothetical question setting forth the facts of the capital offense and Harris' prior criminal history, Dr. Edward Gripon, a psychiatrist, opined that there was a substantial risk that Harris would engage in similar behavior in the future.

In spite of the limitations that Harris placed on trial counsel's pretrial preparation for the punishment phase, trial counsel were able to develop and present the testimony of Evelyn Powell, a counselor with the Orange County Council of Alcoholism, and Nancy Petkovsek, a parole officer, both of whom testified regarding Harris' history of alcoholism, his potential for rehabilitation, and his remorse following the instant offense.[7]

At the conclusion of the punishment phase, the jury was instructed to answer three questions:

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[6]Adams' conviction was subsequently set aside by the Texas Court of Criminal Appeals based on its determination that the State had suppressed evidence favorable to Adams, deceived the trial court, and knowingly used perjured testimony to gain his conviction. *Ex parte Adams*, 768 S.W.2d 281 (Tex. Crim. App. 1989). As the court wrote in its opinion on Harris' direct appeal, "[Harris] was only one witness who committed perjury during Adams' capital murder trial. [Harris] recanted his trial testimony during the hearing on Adams' writ of habeas corpus and attested to Adams' innocence." *Harris*, 784 S.W.2d at 15 n.11.

[7]Trial counsel also intended to present the testimony of a prison chaplain who had become acquainted with Harris since his arrest and had agreed to testify about Harris' religious conversion and repentance; however, they were forced to forego presenting that evidence in light of Harris' escape attempt, which took place while prisoners were being escorted to chapel.

> Was the conduct of the defendant that caused the death of the deceased committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
>
> Is there a probability that the defendant will commit criminal acts of violence that will constitute a continuing threat to society?
>
> Was the conduct of the defendant in killing the deceased unreasonable in response to the provocation, if any, by the deceased?

The jury answered all three questions affirmatively, and Harris was sentenced to death pursuant to Texas law. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 1985).

V. State Habeas Corpus Review

After his conviction and sentence were affirmed on direct appeal, Harris filed a state habeas application raising forty-four separate claims of constitutional error, including the four issues presented in this appeal.

Harris argued in his application that the punishment charge precluded jury consideration of his mitigating evidence, including evidence that the victim shot first. He also asserted that his trial attorneys were ineffective because they did not develop and present evidence at the punishment phase concerning his traumatic childhood, below-average intelligence and organic brain damage, the fact that he was the victim of a homosexual gang rape at age thirteen, and positive attributes of his California prison record. He attached to his application affidavits from both family and non-family witnesses averring that he suffered emotional abuse at the hands of his father, the trauma of losing his younger brother from drowning at age four, and the trauma of being blamed by his father for his brother's death. He presented school records indicating he had an I.Q. score of 88 in the seventh grade and medical records showing that he had suffered two head injuries as a teenager resulting in some "minor EEG changes which are probably of no clinical significance." Harris attached the affidavit of Yolanda

Torres[8] averring that Harris had told her that when he was twelve, other children spread an untrue rumor that he was homosexual, and that when he was thirteen, he was gang-raped by four men while hitchhiking to Port Arthur, Texas. Harris also attached laudatory citations he received in 1983 and 1984 during his incarceration in California. The trial court summarily denied Harris' application, but the Texas Court of Criminal Appeals subsequently remanded the case to the trial court for additional affidavits or, alternatively, an evidentiary hearing concerning the claims of ineffective assistance of counsel and ordered the case filed and set for submission on the challenge to the punishment jury charge.

Harris then supplemented his application with a ten-page "psychosocial assessment" prepared by forensic social worker Fran St. Peter, and a signed "declaration" from Harris, which stated in part:

> My conversations with [trial counsel] regarding the penalty phase of my trial were virtually non-existent. Counsel never indicated nor discussed with me the importance of presenting mitigating evidence at the penalty phase and did not explain to me the general types of evidence that could be submitted or, beyond a brief conversation about testimony from my family, any specific evidence that could be submitted in my case.
>
> * * *
>
> If my tiral [sic] counsel had explained to me the importance of mitigating evidence, I certainly would have instructed them to interview my family members and to elicit testimony from them. I also would have explained to them the facts concerning my background that are set forth in detail in the Habeas petition filed on my behalf . . . .

Trial counsel Dennis Powell submitted an affidavit which stated in part:

> I did extensive investigation into David's background and history. I obtained through the family boxes of information and records of David's background and history. I did interview the family members. The decision as to the mitigation evidence to be presented was made by the client, contrary to counsel's advice.
>
> * * *

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[8]Torres was apparently Harris' fiancée at the time of his state habeas corpus proceedings. It is unclear when they met or when they became engaged, but there is no indication in the record that Torres was acquainted with Harris at the time of his trial or that she was available or willing to testify at his trial.

> [E]fforts were made to [present mitigating evidence from family members] but such efforts were rejected by the defendant. . . .

Trial counsel Clay Dugas submitted an affidavit which stated in part:

> The witnesses called in the punishment phase were called pursuant to discussions with the defendant. . . .
>
> * * *
>
> The mitigating evidence which was presented on behalf of David Ray Harris was presented with the consent of the defendant. My recollection is that persons whom we would have liked to call on behalf of the defendant, and many facts which we would have liked to have delved into were ruled out by the defendant. I might furthermore add that many of the factors which could possibly have been brought out pertaining to David Ray Harris' past were matters which if brought would "open the door" to many other areas of David Ray Harris' past which would in counsel's mind have prejudiced the jury even more so against the defendant. In short, the mitigating evidence which was presented was the result of trial strategy. . . .

After considering the extensive affidavit testimony, the state habeas court issued findings of fact and conclusions of law and recommended that relief be denied.[9] With regard to the claim of attorney ineffectiveness, the court made the following findings of fact:

> Trial counsel did extensive research and investigation to discover favorable mitigating evidence. All matters were fully and completely conveyed to and discussed with Petitioner. The decision as to what evidence to produce or not present at trial was made intentionally, knowingly and voluntarily by Petitioner.
>
> All matters of consequence that occurred during trial were evaluated carefully and properly by trial counsel and Petitioner, and all decisions were made solely as the result of trial strategy.

The Court of Criminal Appeals adopted these findings and denied relief on this claim.

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[9]The Honorable Larry Gist, the judge who presided over Harris' state habeas corpus proceedings, also presided over his trial.

VI. Federal Habeas Corpus Review

Harris then filed his habeas petition in federal district court raising essentially the same claims and offering the same documentary support. The district court conducted the first of two evidentiary hearings at Harris' request on July 15 and 16, 1996. Harris presented as witnesses at the evidentiary hearing his mother, Ann Harris, and a family friend, Eva Stewart, who testified at length regarding Harris' childhood and young adulthood, particularly his difficulty coping with the death of his four-year-old brother at the age of three and the disparate treatment and emotional abuse he received from his father throughout his life.

However, these witnesses also had personal knowledge about Harris' past criminal acts, in addition to those already offered by the State at the punishment phase, such as stealing his own parents' car and burglarizing neighbors' homes. 6 R 36, 71-72. Even when his parents sent him to live with his aunt, Kay Furnish, in California in hopes of breaking him from the life of crime he had fallen into in Vidor, Harris continued to cause trouble for his aunt and was eventually asked by her to leave. 6 R 38-39, 79. They further testified that Harris was raised in a supportive, financially secure, two-parent household (6 R 35); that each time Harris was incarcerated, his parents were there for him after his release, providing him with a job, a car, and a home (6 R 42-43, 75, 77); and that his friends and family essentially tried everything they could to get Harris on the right track, but their efforts only ended in frustration. 6 R 55-56, 74. Further, Harris' mother testified that, because of what she perceived as favoritism on her husband's part for Ricky, and later Mark, over David, she in fact favored David and "tried to give him the attention that his daddy wasn't giving him." 6 R 44. She also testified that Harris' father used his pension to finance Harris' legal representation at trial. 6 R 46.

Harris also presented trial attorneys Dennis Powell and Clay Dugas, who testified that they were aware of a great deal of the evidence concerning Harris' family background, 6 R 145-147, 178, but that Harris refused to allow them to develop and present it. 6 R 121, 128-131, 147-148, 178-180, 201, 205, 217-218. Harris himself testified that, at the time of trial, it was his desire "to put up a wall around [his] family life

and to shield that and those matters from coming into court[.]"[10] 5 R 104-105. Trial counsel testified that the limitations imposed by Harris necessarily limited their efforts to develop and present punishment-phase evidence. 6 R 134, 147, 217-218.

Counsel further testified that they believed there was no basis to present evidence at punishment that Harris had below-average intelligence or brain damage, had been the victim of a homosexual rape, or had a good prison record. Powell testified without contradiction that Harris' demeanor and behavior gave him no indication that Harris was mentally deficient or brain-damaged.[11] 6 R 169-170, 172. Powell and appellate counsel Doug Barlow both testified that Harris was very bright and was, in fact, more intelligent than the average criminal defendant. 6 R 169-170, 172; 5 R 36; *see also* 5 R 68-69. Harris participated actively in both the trial and appellate phases of his case. He corresponded regularly with his attorneys, frequently providing them with citations to relevant case law and cogent legal analyses of potential claims.[12] 6 R 170-171; 5 R 30-36; RX 40-62.

Counsel testified they were unaware at the time of trial of any evidence that Harris had ever been the victim of a homosexual gang rape; Harris never volunteered any such information, and counsel knew of no other way they could have discovered it. 6 R 166-167; *see also id.* at 150. Notably, Harris neither called Yolanda Torres as a witness nor proffered her affidavit for admission into evidence at the federal evidentiary hearing. *See* 5 R 47 (withdrawing affidavit of Yolanda Torres). Thus, Harris presented no evidence in federal court supporting his claim that he was raped.

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[10]Ann Harris testified that Dennis Powell told her before trial that Harris had "insist[ed]" that she not testify. 6 R 32. Both Ann and David Harris acknowledged that Harris was very protective of his family and felt bad for putting them through the embarrassment and pain of his being charged with and tried for capital murder, and that his instructions to trial counsel to keep his family out of it were consistent with Harris' propensities for shielding his family from the process. 6 R 54; 5 R 97, 104-105.

[11]The only evidence presented by Harris at the federal evidentiary hearing to support his claim of below-average intelligence and brain damage was the same evidence he had presented in his state habeas corpus proceeding: an I.Q. score of 88 in the seventh grade (PX 8) and hospital records documenting two head injuries Harris suffered as a teenager (PX 6).

[12]Further, Harris' mother testified that Harris had received his paralegal license through correspondence courses while incarcerated on death row and, in fact, assisted other inmates in preparing legal documents. 6 R 44-45, 55.

Finally, as trial counsel testified without contradiction at the evidentiary hearing, they were aware of Harris' prior prison stay and had, in fact, reviewed the California prison records, which were made available to them by the State before trial, but found nothing substantially favorable.[13] 6 R 152, 174-175, 212. Further, trial counsel received no indication from Harris that the prison records contained anything that could reflect favorably upon his character. *Id.* In fact, the only thing Harris informed trial counsel Clay Dugas of in connection with his California prison stay is that his sentence was extended when he was convicted of possession of a handmade deadly weapon while in prison. 6 R 211-212. The prison records themselves reveal that, in addition to his conviction for possession of a weapon by a prisoner offered by the State at trial, Harris was found in possession of a handmade weapon on at least three more occasions while incarcerated in California; he was eventually placed in segregated housing as a result. RX 4-6, 10-11 (admitted at 5 R 51). He was also written up for fighting, participating in a riot, and engaging in prohibited sexual contact. RX 7-8, 13-14 (admitted at 5 R 51).

At the second evidentiary hearing on August 31, 1998,[14] Harris presented the testimony of forensic social worker Fran St. Peter, who opined that Harris' emotional and psychological development were arrested prior to the sixth grade due to his traumatic childhood and polysubstance abuse at an early age.[15] 9 R 10-18. St. Peter further testified that she believed Harris suffers from alcohol dependence and alcohol idiosyncratic intoxication disorder, which results in an individual having a total change in personality when under the influence

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[13]Harris offered into evidence laudatory citations he received in 1983 and 1984 during his incarceration in a California prison for armed robbery. PX 15. However, the source of these citations is unclear as they were not included in the official prison records obtained by the State at trial or by counsel for the Director in preparation for federal proceedings. Assuming they were in Harris' possession at the time of trial, he apparently failed to alert counsel to the existence of such information. 6 R 152, 174-175, 212.

[14]After initially overruling the Director's objections to several hearsay affidavits presented by Harris in lieu of live testimony at the first evidentiary hearing, the district court sustained the Director's renewed objection in an order issued almost two years after the first hearing and invited Harris to request a second hearing at which he could present these witnesses' live testimony.

[15]Harris also presented witnesses Terrence Kirk and Jay Swango, but their testimony is not relevant to the issues presented in this appeal.

of alcohol. 9 R 18-19. She acknowledged on cross-examination, however, that the most recent version of the Diagnostic and Statistical Manual does not recognize alcohol idiosyncratic intoxication disorder as a separate diagnosis. 9 R 28.

The district court then referred the case to a magistrate judge to prepare a report and recommendation. The magistrate judge recommended that Harris' petition be conditionally granted based on his conclusion that trial counsel rendered ineffective assistance at the sentencing hearing, but that relief on Harris' other claims be denied. Harris' Appendix (hereinafter "App.") E. In so holding, the magistrate judge seized on testimony from trial counsel Dennis Powell that he was circumventing Harris' pretrial instructions when he cross-examined the State's witnesses and called two defense witnesses at the punishment phase of trial. App. E-26. Characterizing this testimony as inconsistent with Powell's affidavit testimony in state court that "[t]he decision as to the mitigation evidence to be presented was made by the client," the magistrate judge held that Harris had proved that the state court's findings were erroneous and thus had rebutted the presumption of correctness accorded under former 28 U.S.C. § 2254(d).[16] App. E-26-27. Significantly, though, the magistrate judge went on to make the inconsistent finding that "Harris did have a change of heart after being convicted, and he agreed to allow counsel to put on their case in mitigation. . . ." App. E-28. Trial counsel's misstep, according to the magistrate judge, was in failing to continue investigating and developing evidence regarding Harris' background through non-family member witnesses, despite Harris' initial instructions, in the hopes that Harris would have a change of heart.[17] App. E-3-28-29. The magistrate judge

[16]Actually, the magistrate judge erroneously applied the amended version of 28 U.S.C. § 2254(e)(1), but the district court corrected the error. *See* App. F-15.

[17]The magistrate judge determined that trial counsel performed deficiently, not only in failing to present evidence regarding Harris' family, but also in failing to investigate and present evidence regarding a homosexual gang rape, below-average intelligence, organic brain damage, and prison record. Failing to account for trial counsel's testimony setting forth the strategic reasons for not presenting this evidence – *i.e.*, that they knew of no evidence to support the allegations, that the evidence would do Harris more harm than good – the magistrate judge surmised that counsel's failure to investigate these areas was based, not on the strategic reasons identified by counsel, but on Harris' instructions to counsel not to present mitigating evidence, which according to the magistrate judge constituted deficient performance given his determination that counsel mistook the scope of Harris' instructions. *See* RE Tab 8 at 935-936.

further held that, had counsel presented evidence of Harris' family background, the homosexual gang rape, below-average intelligence, organic brain damage, and prison records, there is a reasonable probability that he would not have been sentenced to death. App. E-35; *see also* App. F-23-24.

After both parties filed written objections to the magistrate judge's report and recommendation, the district court issued a memorandum opinion adopting the magistrate's report, except as specifically noted in the opinion, and concluding in addition that Harris was also entitled to relief based on his conclusion that the punishment charge precluded jury consideration of evidence that the victim shot first. App. F-4-5. The district court acknowledged that this evidence is relevant to the third special issue, but concluded nonetheless that the special issue was an inadequate vehicle because it suffered the same defect as the "nullification instruction" recently condemned by this Court in *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*). Specifically, the court held that the instructions were internally contradictory and confusing to the jury because the jury could not logically answer the third punishment issue "no" as such a response would have been inconsistent with its finding at the guilt-innocence phase (in rejecting Harris' voluntary manslaughter defense) that Harris did not kill "under the immediate influence of sudden passion based upon adequate cause." App. F-5.

The United States Court of Appeals for the Fifth Circuit reversed the lower court's grant of relief on these two claims and affirmed its judgment on three additional claims cross-appealed by Harris.

ARGUMENT

I. The Questions Presented For Review Are Unworthy Of The Court's Attention.

The Rules of the Supreme Court provide that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." SUP. CT. R. 10. In the instant case, Harris fails to advance a "compelling reason" for this Court to review his case, and none exists.

II. Harris Was Not Deprived of Constitutionally Effective Assistance of Counsel at the Punishment Phase of His Trial.

In Harris' first question presented for review, he complains that his trial attorneys rendered ineffective assistance at the punishment phase when they failed to investigate, develop and present evidence Harris claims was available. However, trial counsel's performance at the punishment phase was certainly reasonable in light of the limitations Harris placed on them.[18] But, in any event, regardless how these deficient-performance issues are resolved, the court of appeals correctly reversed the district court's judgment because Harris has failed to prove prejudice.

A. The federal district court erred in finding deficient performance.

The federal district court failed to accord proper deference to the state court findings disposing of this claim. But, in any event, the evidence presented at the federal hearings only underscores the correctness of the state court findings.

State court findings of fact are entitled to a presumption of correctness "unless they are not 'fairly support[ed]' by the record, or another of the exceptions applies, or [Harris] establishes 'by convincing evidence' that they are erroneous." *Self v. Collins*, 973 F.2d 1198, 1204 (5th Cir. 1992) (quoting former 28 U.S.C. § 2254(d)).[19] A federal habeas court must "more than simply disagree with the state court before rejecting its factual determinations." *Marshall v. Lonberger*, 459 U.S. 422, 432 (1983) (internal quotation omitted).

Apparently satisfied that the state court's findings were the result of a full and fair hearing and that none of the eight enumerated exceptions to the former statutory presumption of correctness applied, the district court held nonetheless that Harris had demonstrated by convincing evidence presented in federal court that the findings are erroneous. App.

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[18]The court of appeals assumed arguendo the validity of the district court's deficient-performance finding and resolved the claim based on the absence of prejudice. *See* App. A-8.

[19]Harris' federal petition was filed in district court on April 28, 1992, prior to the effective date of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (1996); thus, it is governed by the pre-amendment version of the federal habeas corpus statute. *Lindh v. Murphy*, 521 U.S. 320, 335 (1997).

E-26-27, F-16; *see also* 28 U.S.C. § 2254(d) (West 1992). However, the record of the federal hearing reveals that it resulted in essentially the same, though more expansively developed, testimony as that presented through affidavit in state court. *See* Statement of Facts at 6-12, *supra*. But while the state court credited the affidavit testimony of trial counsel over that of Harris and found that "[a]ll matters were fully and completely conveyed to and discussed with [Harris]" and "[t]he decision as to what evidence to produce or not present at trial was made intentionally, knowingly and voluntarily by [Harris]," the district court spurned these findings and credited Harris. App. F-20.

The district court's holding that Harris has overcome the presumption of correctness hinges on a perceived discrepancy between the affidavit testimony of Dennis Powell "that all decisions about what evidence to present and what witnesses to call at the punishment phase of the trial were made by Harris" and his testimony at the federal hearing that "they called witnesses and presented evidence at the punishment phase of the trial despite allegedly being told not to do so by Harris." App. F-15-17. However, the record as a whole shows that trial counsel did comply with Harris' wishes regarding the punishment phase, as the state court found. Powell's only concession at the federal hearing was that their presentation of Evelyn Powell and Nancy Petkovsek at the punishment phase conflicted with instructions they had received from Harris *before he was found guilty of capital murder*. *See* 6 R 184-185. The district court itself reconciled any discrepancy arising from this testimony in its subsequent finding that, while Harris initially instructed his attorneys not to present additional evidence at the punishment phase, he had a "change of heart" after the jury found him guilty of capital murder and agreed to allow counsel to present a case in mitigation. App. E-28.

The district court erred in holding that Harris established by convincing evidence that the state court findings are erroneous. If anything, the evidence presented in federal court lends the findings further support. The state court findings are entitled to the presumption of correctness and compel the rejection of Harris' claim of ineffective assistance of counsel at the punishment phase.

Claims of ineffective assistance of counsel are judged under the two-prong test of *Strickland v. Washington*.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel was not

> functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. 668, 687 (1984), *quoted in Williams v. Taylor*, 529 U.S. 362, 390 (2000) (quotation marks omitted). "To establish ineffectiveness, a defendant must show that counsel's representation fell below an objective standard of reasonableness." *Williams*, 529 U.S. at 390-91 (quoting *Strickland*, 466 U.S. at 688, 694) (quotation marks omitted).

Defense counsel has a duty to make a reasonable investigation or to make reasonable decisions that make particular investigations unnecessary. *Strickland*, 466 U.S. at 691. However, a court must assess counsel's investigatory decisions in light of the defendant's own statements and actions. *Id.*

> Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. . . . [W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

Id. Thus, the scope of an attorney's duty to investigate may be limited by a defendant's lack of cooperation. Indeed, a criminal defendant cannot block his attorneys' efforts and later claim that the resulting performance was constitutionally deficient.

The state court's finding that "[t]he decision as to what evidence to produce or not present at trial was made intentionally, knowingly and voluntarily by [Harris]" therefore precludes a finding of deficient performance.

Furthermore, even if the state court findings were not entitled to deference, Harris has failed to prove that trial counsel performed deficiently at the punishment phase. In granting Harris relief on this claim, the lower court disregarded *Strickland*.

The district court held that Harris' trial attorneys rendered deficient performance because they failed to investigate, determine the existence of, and present evidence at the punishment phase regarding Harris' childhood, mental impairments, and good behavior in prison. The court

found that while Harris originally instructed counsel not to present a case in mitigation at the punishment phase, he had a change of heart after the jury found him guilty of capital murder and allowed them to present evidence at punishment. App. E-27-29. Trial counsel's error, according to the district court, was in failing to continue investigating Harris' background despite Harris' pretrial instructions to the contrary to be ready with this evidence when Harris gave them the "green light." However, this holding imposes a duty on counsel that is insupportable in light of *Strickland*.

Even in light of the district court's finding that Harris had a change of heart after the guilty verdict and would have allowed counsel to present this evidence,[20] the fact remains that until that time, Harris had refused to cooperate with or assist counsel in preparing for the punishment phase and had instructed them to focus their efforts on the guilt-innocence phase. *See* App. E-27; *see also* Statement of Facts at 2-3, 9-11, *supra*. Furthermore, counsel did not "blindly follow [Harris'] command" to focus their efforts on the guilt-innocence phase. *Mitchell v. Kemp*, 762 F.2d 886, 889 (11th Cir. 1985) (holding that counsel's failure to investigate and present mitigating evidence was not deficient performance, noting that counsel's "ability to obtain such . . . evidence at the time was inhibited by Mitchell's direction not to call his family. . . ."). Rather, counsel continued investigating Harris' background, but their efforts were stymied by Harris' refusal to cooperate. *See Strickland*, 466 U.S. at 691 (holding that counsel's investigatory decisions must be assessed in light of defendant's own statements and

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[20]Furthermore, while not critical to the Director's argument on this issue, it is the Director's position that, to the extent the lower court found that, after his apparent change of heart, Harris would have agreed to the presentation of mitigating evidence regarding his childhood and family background at punishment, this finding is clearly erroneous. The record reveals that Harris agreed to the presentation of two non-family witnesses at the punishment phase of trial on topics unrelated to his family history. There is no indication in the record, however, that Harris would have agreed to the presentation of testimony, whether from family members or non-family members, concerning his childhood and family. 6 R 31-32, 121, 128-131, 147-148, 156, 178-180; 201, 205, 217-218; 5 R 97, 104-105.

Additionally, to the extent the district court found that Harris only instructed counsel not to call family members as witnesses at trial, but did not prohibit them from presenting evidence regarding his childhood and family background from other sources, that finding is clearly erroneous. The record shows that Harris specifically instructed his attorneys not to call his family members to the stand *and* not to present evidence, from any source, regarding his childhood and family history. 6 R 31-32, 121, 128-131, 147-148, 156, 178-180; 201, 205, 217-218; 5 R 97, 104-105.

actions). Thus, even assuming the validity of the district court's findings, the court erred as a matter of law in holding that the facts as found entitled Harris to relief.

B. In any event, Harris has failed to prove that he was prejudiced by trial counsel's punishment-phase performance.

Alternatively, even assuming that Harris could prevail on the deficient-performance prong, he has failed to prove, "in light of the overall weakness of the proposed mitigating evidence," that he was prejudiced by the omission of evidence regarding his childhood, mental impairments, and good behavior in prison. *See* Harris' Appendix A-10.

Harris must affirmatively prove prejudice by demonstrating that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, *quoted in Williams v. Taylor*, 529 U.S. at 391. In the context of a claim that counsel rendered ineffective assistance at the punishment phase of a capital murder trial, the inquiry is whether there is a reasonable probability that, had the evidence been presented, it would have altered the jury's punishment verdict. *See Strickland*, 466 U.S. at 695.

As the court of appeals concluded, the district court, in holding that Harris proved prejudice, failed to take into account the serious negative aspects of the evidence Harris proposes should have been presented. *See* App. A-9. Regarding Harris' evidence of his traumatic childhood, which the court of appeals aptly characterizes as "less than compelling," App. A-9, the very people who could relate these facts also had personal knowledge of Harris' violent past; the State could have easily used these witnesses to reveal that Harris was even more dangerous than he already appeared. *See* Statement of Facts at 9, *supra*. Furthermore, the State would have had a powerful argument that, despite the fact that Harris grew up in a supportive family and had ample opportunity to lead a profitable life, he chose to lead the life of a criminal instead. Similarly, Harris' California prison records, as a whole, reveal that Harris was less than a model prisoner; had counsel tried to argue to the jury, based on some commendations that Harris received while incarcerated, that he was a "good prisoner," the State would almost certainly have rebutted that argument with the ample unfavorable information contained in the

records, which Harris' jury never heard. *Id.* at 11.

Harris' claims that he was mentally impaired and the victim of rape suffer from a lack of evidentiary support. An I.Q. score of 88 in the seventh grade,[21] even if it is assumed that the score was truly indicative of Harris' intellectual functioning, simply does not rise to the level of evidence reducing his culpability for the offense. And there is simply no evidence that Harris is brain-damaged. Indeed, in light of the overwhelming evidence in the record attesting to Harris' intelligence, including his testimony at the guilt-innocence phase of trial, a mitigation theory based on Harris' limited mental capacity would have been utterly implausible. Likewise, Harris failed to present any evidence in federal court to support his allegation that he was the victim of a homosexual gang-rape when he was thirteen years old.

The evidence Harris proposes should have been introduced at the punishment phase of his trial stands in stark contrast to the evidence omitted by trial attorneys in *Williams v. Taylor*, in which this Court held that the defendant had proved prejudice. Williams' attorneys had failed to discover evidence "that the defendant's parents were imprisoned for criminal neglect of their children, that defendant had been repeatedly beaten by his father, that while his parents were imprisoned he spent time in an abusive foster home, and that he had been returned to the custody of his abusive parents upon their release from prison," as well as evidence of borderline mental retardation and good prison record. App. A-9. *See Williams*, 529 U.S. at 395-396.

Harris' evidence of emotional abuse suffered at the hands of his father does not even approach the evidence of extreme physical abuse and neglect omitted by Williams' counsel; likewise, Harris' evidence of below-average intelligence is not comparable to evidence that Williams was "borderline mentally retarded." The only evidence even remotely similar to that cited by the Court in *Williams* is the commendations Harris received while in prison in California, but Harris' prison records contain more unfavorable information. *See* Statement of Facts at 11, *supra*.

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[21]In finding prejudice, the district court likened the omitted evidence in this case to that omitted by counsel in *Duhamel v. Collins*, 955 F.2d 962, 965-966 (5th Cir. 1992), in which the Fifth Circuit found the defendant *had failed to prove prejudice*. *See* App. E-31-32 It should be noted that, contrary to the district court's statement that "Duhamel's and Harris' IQ scores were similar," RE Tab 7 at 898, evidence existed "that Duhamel was moderately mentally retarded with an IQ of 56 [and] that he failed every grade but kindergarten." *Duhamel*, 955 F.2d at 966.

Harris' case is more closely comparable to *Burger v. Kemp*, 483 U.S. 776, 788-796 (1987), in which the Court held that trial counsel did not render ineffective assistance in choosing not to investigate and present evidence of his client's troubled family background. The cases involve similar degrees of abuse: Harris, the victim of emotional abuse in an otherwise stable home, and Burger, the victim of severe neglect and an extremely unstable environment. 483 U.S. at 789-790. In both cases, significantly, the witnesses who were available to relate the facts of the defendants' family background also had personal knowledge regarding the defendants' violent past not related through other witnesses, facts that if revealed through cross-examination, could harm their chances for a life sentence. *Id.* at 792. Burger, unlike Harris, had virtually no criminal record and no record of violent conduct. *Id.* at 790. And Burger's attorneys, unlike Harris', presented no mitigating evidence. *Id.* at 788. In light of these facts, the Court held that Burger had "made no showing that the justice of his sentence was rendered unreliable by a breakdown in the adversary process caused by deficiencies in counsel's assistance." *Id.* at 795-796. The same holds true in this case.

In light of the record as a whole – the relative weakness of Harris' proposed evidence, the aggravating aspects of the evidence, the strong evidence of guilt, the aggravating evidence presented by the State at trial, and the mitigating evidence presented by counsel at trial regarding Harris' alcoholism and remorse for the instant offense – there is no reasonable probability that the presentation of this additional evidence at the punishment phase of trial would have altered the jury's punishment verdict. The court below correctly reversed the district court's finding of prejudice, and this Court should deny certiorari review.

III. Harris' Federal Constitutional Rights Were Not Violated by Testimony Regarding His Arrest for Attempted Burglary and Subsequent Kidnapping Charge, Although He Was Ultimately Acquitted of the Kidnapping Charge.

In his second question presented, Harris asserts that it was improper for the prosecution to adduce punishment-phase evidence about the circumstances of a kidnapping charge for which Harris was ultimately acquitted. As the lower courts correctly determined, however, introduction of this evidence for purposes of proving Harris' future

dangerousness was not contrary to the collateral estoppel aspect of double jeopardy and thus did not violate due process.[22]

At the punishment phase of trial, the State presented the testimony of Deputy Sheriff Ray Rucker of San Bernadino, California, that on November 3, 1979, he responded to a call reporting that shots had been fired at an electronics store. He discovered the suspect vehicle in the parking lot of a nearby convenience store, and saw Harris standing near the front of the vehicle with another suspect, James Filaan; a third suspect, Louis Valdevia, was sitting inside the vehicle. As Harris, on Rucker's command, started backing toward another officer for a pat-down search, a loaded .38 caliber revolver fell from his waistband. Harris was arrested for carrying a concealed weapon and attempted burglary of the electronics store. Valdevia and Filaan were also arrested at that time. Rucker further testified that Harris and Valdevia were later charged with kidnapping Filaan and with attempted robbery of the convenience store. Rucker testified that he believed Filaan had been kidnapped based on his observation that Filaan was in fear and almost hysterical at the time of the arrest. Harris was subsequently convicted of robbery, burglary, and two counts of attempted burglary.

On cross examination by defense counsel, Rucker stated that, after being arrested, Filaan, who was at that time suspected in connection with another felony, told police he had been kidnapped by Harris and Valdevia and that the only reason he participated in the attempted burglary and robbery was because they forced him to. Although Rucker believed Harris had kidnapped Filaan, Harris was acquitted of the kidnapping charge.

The fact that Harris had been acquitted on the kidnapping charge did not preclude the State's evidentiary use of these facts at the punishment phase of his capital murder trial. Although due process requires the application of collateral estoppel, *Ashe v. Swenson*, 397 U.S. 436 (1970), that doctrine "does not preclude [the State] from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof." *Dowling v. United States*, 493 U.S. 342, 349

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[22]For the first time in this Court, Harris also articulates a Sixth Amendment claim based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002).

(1990).[23] In *Dowling*, this Court rejected a comparable due process challenge involving the government's evidentiary use – for the purpose of establishing Dowling's identity as the perpetrator of the charged offense – of an extraneous offense of which he had been acquitted. *Id.* at 352-54. The Court declined to extend principles of double jeopardy and due process to exclude "relevant and probative evidence . . . simply because it relates to alleged criminal conduct for which a defendant has been acquitted." *Id.* at 348.

The rationale of *Dowling* applies with equal force here. "There are any number of possible explanations for the jury's acquittal verdict at [Harris'] first trial." *Dowling*, 493 U.S. at 352. The mere fact that the California jury, for whatever reason, determined that the prosecution had failed to prove, beyond a reasonable doubt, the elements of kidnapping does not render the challenged evidence any less relevant to the capital-sentencing determination. Evidence that Harris tried to coerce another individual to commit robbery, even if such coercion did not amount to kidnapping, is indisputably relevant to and probative of Harris' propensity for future violent conduct. Moreover, Harris' jury was informed fully about the circumstances of the kidnapping charge (including the fact that Filaan was originally considered a co-defendant and was at that time wanted in connection with another felony) and the fact that Harris was acquitted of the kidnapping charge. It was essentially up to the jury to determine whether Rucker's testimony concerning the kidnapping charge had any bearing on its answers to the punishment special issues.

Harris' belated reliance upon *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), is unavailing. As an initial matter, because Harris' case is on collateral review, he is barred from relying upon the rules announced in *Ring* and *Apprendi* well after his conviction became final. *Teague v. Lane*, 489 U.S. 288 (1989). Furthermore, the *Teague* bar aside, *Ring* and *Apprendi* are inapposite. In *Ring*, the Court held that "[i]f a State makes an increase in a defendant's authorized punishment *contingent on* the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." 536 U.S. at 602 (citing *Apprendi*, 530 U.S.

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[23] At the punishment phase of a Texas capital murder trial, while the statutory special issues must be proved beyond a reasonable doubt, extraneous offenses offered to prove the special issues do not themselves have to be proved beyond a reasonable doubt.

at 482-83) (emphasis added). Unlike the sentencing factors at issue in *Ring*, the prior kidnapping charge was neither "essential" nor "necessary" for imposition of the death penalty in Harris' case, and thus cannot be characterized as an "element" of the sentence for Sixth Amendment purposes.[24] The lower courts correctly denied relief on this claim, and certiorari review should also be denied.

IV. The Punishment-phase Charge Permitted Jury Consideration of Evidence That the Victim Shot First.

Harris next claims that the punishment charge precluded jury consideration of evidence that Mark Mays fired his weapon first. Clearly, as the court of appeals held, the jury was permitted to consider this evidence when deliberating the third special issue submitted at punishment: "Was the conduct of the defendant in killing the deceased unreasonable in response to the provocation, if any, by the deceased?" The district court's contrary holding was based on an unwarranted extension of this Court's holding in *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*), and a faulty construction of the special issue, which is supported by neither Texas law nor the record in this case.

A. Harris' jurors were not directed to violate their oaths to give effect to mitigating evidence, therefore, *Penry II* is inapposite.

Harris relies on this Court's recent opinion in *Penry II* to support his claim that the third special issue did not provide an effective means for consideration of this evidence. However, that reliance is misplaced. In *Penry II*, jurors were given the same three special issues submitted in this case. 532 U.S. at 788-789. They were also given a supplemental "nullification instruction" directing jurors to answer any special issue in the negative – even if the evidence did not support a negative answer – if they believed the mitigating circumstances warranted a life sentence. *Id.* at 789-790. The Court held that the instructions failed to provide an adequate vehicle for the jury to make a reasoned moral response to Penry's evidence of mental retardation and childhood abuse:

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[24]Additionally, Harris' challenge stands in sharp contrast to the challenges raised in *Ring* and *Apprendi*: Harris challenges an evidentiary ruling, not a statutory scheme.

> Here . . . it would have been both logically and ethically impossible for a juror to follow both sets of instructions. Because Penry's mitigating evidence did not fit within the scope of the special issues, answering those issues in the manner prescribed on the verdict form necessarily meant ignoring the command of the supplemental instruction. And answering the special issues in the mode prescribed by the supplemental instruction necessarily meant ignoring the verdict form instructions. Indeed, jurors who wanted to answer one of the special issues falsely to give effect to the mitigating evidence would have had to violate their oath to render a "'true verdict.'" TEX. CRIM. PROC. ANN., art. 35.22 (Vernon 1989).
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> The mechanism created by the supplemental instruction thus inserted "an element of capriciousness" into the sentencing decision, "making the jurors' power to avoid the death penalty dependent on their willingness" to elevate the supplemental instruction over the verdict form instructions. *Roberts v. Louisiana*, 428 U.S. 325, 335 (1976) (plurality opinion).

Id. at 799-800. The charge submitted in Harris' case does not create the same dilemma. Jurors in Harris' case were not instructed to violate their oaths to give effect to evidence that the victim shot first. They were not directed to answer a special issue falsely to arrive at a preferred sentencing decision. Rather, they were instructed, consistent with then-existing Texas law, to answer three special issues according to the evidence presented. As the court of appeals concluded, *Penry II* does not require that Harris' death sentence be vacated.

B. Neither Texas law nor the record in this case supports Harris' assertion that jurors believed they were precluded by their rejection of the voluntary manslaughter defense at the guilt-innocence phase from answering the third special issue negatively.

Furthermore, even if the Court's narrow holding in *Penry II* could be extended to apply to a case where jurors were not required to violate their oaths in order to give effect to a capital defendant's mitigating evidence, a negative answer to the third special issue is not inconsistent with the jury's rejection of the voluntary manslaughter defense at the guilt-innocence phase. Harris' construction of the third special issue has

absolutely no support in either Texas case law or the record in this case.[25]

The Texas courts' construction of the third special issue clearly defines the provocation inquiry more broadly than the guilt-innocence inquiries of self defense and voluntary manslaughter. In *Jurek v. Texas*, this Court upheld the former Texas capital sentencing scheme, stating that "the constitutionality of the Texas procedures turns on whether the enumerated questions allow consideration of particularized mitigating factors." 428 U.S. 262, 272 (1976). The *Jurek* Court discussed the second special issue in depth, but had only this to say about the first and third special issues:

> The Texas Court of Criminal Appeals has not yet construed the first and third questions. . . thus it is as yet undetermined whether or not the jury's consideration of those questions would properly include consideration of mitigating circumstances. In at least some situations the questions could, however, comprehend such an inquiry. *For example, the third question asks whether the conduct of the defendant was unreasonable in response to any provocation by the deceased. This might be construed to allow the jury to consider circumstances which, though not sufficient as a defense to the crime itself, might nevertheless have enough mitigating force to avoid the death penalty* . . . . We cannot, however, construe the statute; that power is reserved to the Texas courts.

Id. at 272 n.7 (emphasis added).

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[25]Alternatively, even if the third special issue did not provide an adequate vehicle, each of the first two special issues provided a means for the jury to consider evidence that the victim shot first. If the jury believed that, in the heat of a gun battle initiated by Mays, Harris was "panicked, scared" and that "the events happened quickly, that he did not know what he was thinking at the time, and that he did not know what to do" (1 R 11z), the jury could have answered "no" to the deliberateness inquiry of the first special issue. In fact, Harris' trial counsel made this argument to the jury at the punishment phase. 17 SR 694-698 (urging jury to answer first special issue "no" based on "moving gun battle" between Harris and Mays). Likewise, if the jury believed that Mays provoked Harris' gunfire, "it could have given effect to [the] provocation by finding that, ordinarily, absent such provocation, [Harris] would be non-violent. Such an understanding would support a negative response to the second issue on future dangerousness." *White v. Collins*, 959 F.2d 1319, 1324 (5th Cir. 1992). *See also Ex parte Harris*, 825 S.W.2d 120, 121-22 (Tex. Crim. App. 1991) (holding that second special issue provided adequate vehicle for consideration of evidence that Mays shot first).

A year later in *Brown v. State*, the Texas court rejected a defendant's claim that the provocation issue asks no more than that the jury reconsider its earlier decision that the killing was murder rather than voluntary manslaughter. 554 S.W.2d 677, 678-679 (Tex. Crim. App. 1977). And in *Evans v. State*, the court essentially adopted the dicta in *Jurek* to reverse a death sentence based on the trial court's failure to submit the third special issue to the jury in light of evidence raising an imperfect self-defense claim. 601 S.W.2d 943, 945-947 (Tex. Crim. App. 1980). The Texas court acknowledged this precedent in Harris' direct appeal when it assumed that he was entitled to submission of the third special issue despite its holding that he was not entitled to an instruction on voluntary manslaughter at the guilt-innocence phase. 784 S.W.2d at 10-11.[26]

Thus, the Texas courts have construed the third special issue to permit jury consideration of evidence of provocation that, while mitigating, would not support a claim of self defense or voluntary manslaughter at the guilt-innocence phase. It necessarily follows that, under Texas law, the findings required to support a voluntary manslaughter defense are greater than the findings required to answer the third special issue "no." Therefore, pursuant to Texas law, Harris' jury could logically reject the voluntary manslaughter defense at the guilt-innocence phase, yet nonetheless answer the third special issue "no."

Furthermore, the record in this case belies any claim that Harris' jury believed it was precluded from answering the third special issue "no" in light of its prior rejection of the voluntary manslaughter defense. Harris' trial counsel specifically informed jurors during punishment-phase argument that their guilty verdict did not foreordain an affirmative answer to the third special issue:

> If your guilty verdict in this case answered [the provocation special issue], the Court would not even have to submit a question. If guilty of Capital Murder meant Number Three should be, "Yes," there would be no question.

In light of this record, there is no reasonable likelihood that the jury

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[26] *See also Cantu v. Collins*, 967 F.2d 1006, 1013 (5th Cir. 1992) (rejecting claim of entitlement to voluntary manslaughter instruction despite claimed "inconsistency" between prosecutor's acquiescence to submission of third special issue at punishment and opposition to voluntary manslaughter instruction at guilt-innocence phase).

believed it was barred from considering evidence that Mays shot first.

V. Harris' Jury Was Not Precluded from Considering Any Constitutionally Relevant Mitigating Evidence at the Punishment Phase of Harris' Trial.

Finally, Harris argues that his jury was precluded from considering and giving mitigating effect to evidence of Harris' history of alcoholism and intoxication at the time of the offense in violation of the Eighth Amendment. *See Penry v. Lynaugh*, 492 U.S. 302 (1989). However, Harris presented no evidence at trial that he was intoxicated when he murdered Mark Mays; therefore, this evidence cannot be the basis of an Eighth Amendment claim. Furthermore, Harris' evidence of a history of alcoholism is simply not constitutionally relevant in the absence of evidence of intoxication at the time of the offense. But in any event, even assuming the evidence were constitutionally relevant, the special issues provided an adequate vehicle for jury consideration of that evidence.

A. There is no evidence that Harris was intoxicated when he murdered Mark Mays, therefore, evidence of Harris' history of alcoholism is not constitutionally relevant.

As the Texas Court of Criminal Appeals found on state habeas corpus review, "it is undisputed that [Harris] is an alcoholic, however, there is no evidence in the record that [Harris] was drinking at the time of the instant offense." *Ex parte Harris*, 825 S.W.2d 120, 122 (Tex. Crim. App. 1991). This fact finding is entitled to the presumption of correctness of former 28 U.S.C. § 2254(d) and must be deferred to on federal habeas corpus review. Harris fails to acknowledge, much less rebut, this finding.[27] In fact, in connection with a separate claim in the

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[27]In the district court, Harris cited as evidence that he was intoxicated at the time of the offense the trial testimony of Nancy Petkovsek that "during the commission of all crimes . . . [Harris] was under the influence of an intoxicating beverage." *See* 1 R 11o. However, this citation was taken out of context. Petkovsek clarified her trial testimony at the evidentiary hearing in the court below, stating that she was referring to Harris' intoxication at the time of prior offenses and not at the time of the instant offense. 5 R 57-59. The same was true of Harris' citation to the closing punishment-phase arguments in the court below. *See* 1 R 11o. When considered in context, the arguments were clearly referring to Harris' claim that he was intoxicated when he

court below, Harris appeared to concede this lack of evidence, faulting trial counsel for their failure to present it.[28] Harris' Brief at 35.

A *Penry* claim cannot be based on evidence that was not offered at trial. Although "the sentencer must be allowed to consider in mitigation 'any aspect of the defendant's character or record and any circumstances of the offense *that the defendant proffers* as a basis for a sentence less than death,'" "[n]othing in the Constitution obligates state courts to give mitigating evidence instructions when no evidence is offered to support them." *Delo v. Lashley*, 507 U.S. 272, 275-277 (1993) (quoting *Lockett v Ohio*, 438 U.S. 586, 604 (1978)) (emphasis of Court). Therefore, Harris clearly is not entitled to relief on his *Penry* claim based on his assertion, which was not made to the jury, that he was intoxicated when he murdered Mark Mays.

Moreover, Harris' evidence of alcoholism, which was presented at trial,[29] loses any constitutional relevance it might otherwise have had in light of the fact that there is no evidence Harris was intoxicated when he committed capital murder. The basic concern of *Penry* is "that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Penry*, 492 U.S. at 319. It was undisputed at trial that Harris suffered from

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committed each of the prior offenses offered by the State at the punishment phase.

[28]Harris based his claim of ineffective assistance of counsel on the testimony of Jay Swango at the evidentiary hearing in the district court that he and Harris had drunk about a case and a half of beer over the course of several hours on August 31, 1985. 9 R 48. However, Swango testified that he last saw Harris at about 6:00 or 6:30 that afternoon; the instant offense occurred at approximately 2:30 or 3:00 a.m. on September 1, 1985. 9 R 48-52. Thus, any assertion based on Swango's post-conviction testimony that Harris was intoxicated when he killed Mark Mays is merely speculative, and absent some direct evidence that Harris was intoxicated at the time of the offense, there is no evidence to support his claim. Furthermore, Harris himself took the stand on his own behalf at the guilt-innocence phase of his trial and related to the jury his version of the events, yet not once during his description of the offense did he suggest that he was intoxicated at the time.

[29]Harris presented the testimony of Evelyn Powell, a counselor at the Orange County Council on Alcoholic who treated Harris in 1985 after he was referred to her by his parole officer. Powell testified that Harris was an alcoholic. According to Powell, for five months Harris met with her weekly for an hour, attended Alcoholics Anonymous meetings, and had his alcoholism under control. Powell testified further, based on her training and years of experience, that Harris could, with the proper training, counseling, and effort, bring his alcoholism under control.

alcoholism. But the mere fact that Harris is an alcoholic does not reduce his culpability for Mays' murder. This evidence simply has no relevance, and thus has no mitigating value, to Harris' commission of capital murder. It stands to reason that the Eighth Amendment would not compel its consideration.

B. In any event, the special issues provided an adequate vehicle for consideration of Harris' evidence of alcoholism.

But even assuming the evidence were constitutionally relevant, the jury could give mitigating effect to that evidence through its answers to the special issues. This type of evidence can be given expression via the first special issue, which asks the jury to evaluate the deliberateness of the defendant's actions, as the Fifth Circuit has repeatedly held.[30]

Furthermore, the second special issue[31] provided a constitutionally adequate vehicle for jury consideration of Harris' alcoholism as that evidence was presented and argued at trial. The testimony of Nancy Petkosek and Evelyn Powell was clearly offered in an attempt to persuade the jury that Harris' prior violent history was necessarily, even if not demonstrably, attributable to his alcoholism and intoxication when he committed those offenses and that Harris had the capacity to control his alcoholism and live as a non-violent person except when drinking. Based on her training and years of experience, Powell opined that Harris could bring his alcoholism under control with proper training, counseling, and effort. Petkovsek testified that a death sentence in Harris' case was inappropriate because he still had a contribution to make. Defense counsel argued:

> Let's add some things to that [previous argument that you cannot predict future dangerousness]. The organic substance abuse, the alcohol abuse.
>
> Ladies and gentleman, two women came in on behalf of the

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[30] *See, e.g., Tucker v. Johnson*, 115 F.3d 276, 282 (5th Cir. 1997); *Lackey v. Scott*, 28 F.3d 486, 487 (5th Cir. 1994); *James v. Collins*, 987 F.2d 1116, 1121 (5th Cir. 1993); *Cordova v. Collins*, 953 F.2d 167, 170 (5th Cir. 1992); *Kelly v. Lynaugh*, 862 F.2d 1126, 1133 (5th Cir. 1988).

[31] The second special issue asked: "Is there a probability that the defendant will commit criminal acts of violence that will constitute a continuing threat to society?"

> defense, Mrs. Powell and Miss Petkovsek. Both said these offenses were committed under the influence of alcohol, and if there's violence it's caused by that violence.

As presented and argued, there is not a reasonable likelihood that the jury would have understood the evidence to be beyond its effective reach in answering the second special issue.[32] Certiorari review should be denied on this issue.

CONCLUSION

For the foregoing reasons, the Director respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

BARRY R. McBEE
First Assistant Attorney General

JAY KIMBROUGH
Deputy Attorney General
for Criminal Justice

*GENA BUNN
Chief, Postconviction
Litigation Division

P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 936-1600
(512) 320-8132 (Fax)

* Counsel of Record

Attorneys for Respondent

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[32] *See James v. Collins*, 987 F.2d at 1121 (noting that where defendant presented evidence concerning available alcohol treatment plans, jury could consider evidence of intoxication/alcohol abuse in answering second special issue).

REPLY

BRIEF

(3)

Supreme Court, U.S.
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No. 02-1433

IN THE
Supreme Court of the United States

DAVID RAY HARRIS,
Petitioner

vs.

JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Solace Kirkland Southwick
ANDREWS & KURTH L.L.P.
600 Travis Street, Suite 4200
Houston, Texas 77002
(713) 220-4200

Thomas M. Farrell*
**Counsel of Record*
NICKENS, KEETON,
LAWLESS, FARRELL &
FLACK, L.L.P.
600 Travis, Suite 7500
Houston, Texas 77002
(713) 571-9191
Attorneys for Petitioner,
David Ray Harris

18 pp

CAPITAL CASE

QUESTIONS PRESENTED

1. Did the Fifth Circuit properly disregard defense counsel's failure to investigate and present available mitigation evidence, even though (a) the court viewed the omitted evidence in isolation from the circumstances of the crime and from the mitigating evidence that was presented to the jury, and (b) the Fifth Circuit's decision conflicts with the results reached, on closely analogous facts, by many other circuits?

2. At a capital sentencing hearing, can the State constitutionally use, in its efforts to convince the jury to find the aggravating circumstances required as a prerequisite to the death penalty, evidence of a crime for which a prior jury had acquitted the defendant?

3. Can a death sentence be upheld, consistent with *Penry v. Lynaugh*, 492 U.S. 302 (1989), and *Penry v. Johnson*, 532 U.S. 782 (2001), when the jury was precluded from considering the full mitigating impact of undisputed evidence that the victim initiated the exchange of gun fire that resulted in his death and that the defendant did not fire any shots until after himself being wounded in the neck and shoulder?

4. Can a death sentence be upheld, consistent with *Penry v. Lynaugh*, 492 U.S. 302 (1989), when the jury was precluded from considering the full mitigating impact of undisputed evidence that the defendant suffered from severe alcoholism and drug addiction (and that all of the prior criminal activity proffered by the State at the sentencing hearing was committed under the influence of drugs or alcohol)?

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

A. This case should be held pending resolution of *Wiggins* and *Banks*.

As set forth in Harris's petition for writ of certiorari, the Court granted certiorari in *Wiggins v. Corcoran*, 288 F.3d 629 (4th Cir. 2002), *cert. granted*, 123 S.Ct. 556 (2002) (No. 02-311) to address, among other things, the Fourth Circuit's application of *Strickland v. Washington*, 466 U.S. 668 (1984) in a way that makes counsel's performance virtually unchallengeable. The Fifth Circuit's approach to the question of ineffective assistance of counsel had the same effect in this case, making this Court's resolution of *Wiggins* potentially critical to the resolution of the questions in this case.

Since Harris filed his petition for writ of certiorari, this Court granted certiorari in *Banks v. Cockrell*, No. 01-40058 (5th Cir. 2002) (unpublished opinion), *cert. granted*, 123 S.Ct. 1784 (2003) (No. 02-8286) (April 21, 2003). Certiorari was granted in *Banks* to address a question that is also raised in Harris's petition.

The Court's decision to grant certiorari in *Banks*, coupled with its prior grant in *Wiggins*, strongly suggest that certiorari should be granted in this case or, at a minimum, that consideration of Harris's petition should be held pending resolution of *Banks* and *Wiggins*.

B. This Court granted certiorari in *Banks v. Cockrell* on a question identical to one raised in Harris's petition for writ of certiorari.

On April 21, 2003, this Court granted certiorari in *Banks v. Cockrell* on questions one, two and three raised in the petition. 123 S.Ct. 1784. Question number two asks: "Did

the Fifth Circuit act contrary to *Strickland v. Washington*, 466 U.S. 668 (1984), and *Williams v. Taylor*, 529 U.S. 362 (2000), where it weighed each item of mitigating evidence separately and concluded that no single category would have brought a different result at sentencing without weighing the impact of the evidence collectively?"

In his petition for writ of certiorari, David Ray Harris raised the following question: "Did the Fifth Circuit properly disregard defense counsel's failure to investigate and present available mitigation evidence, even though (a) the court viewed the omitted evidence in isolation from the circumstances of the crime and from the mitigating evidence that was presented to the jury, and (b) the Fifth Circuit's decision conflicts with the results reached, on closely analogous facts, by many other circuits?"

Thus a question raised in both petitions is the same: did the Fifth Circuit conduct an erroneous analysis of harm under *Strickland* when it failed in both *Banks* and *Harris v. Cockrell,* 313 F.3d 238 (5th Cir. 2002) to weigh the mitigating evidence in light of all of the evidence available in mitigation or aggravation? There can be little doubt that if this Court determines that the Fifth Circuit's analysis in *Banks* ran afoul of *Strickland,* its analysis in this case was likewise erroneous.

In this case, as fully set forth in the petition for certiorari, the Fifth Circuit examined the mitigating evidence raised in the habeas proceeding without considering at the same time the evidence that was offered in mitigation at trial or the facts and circumstances of Harris's crime.

The Fifth Circuit's error in both *Banks* and this case is very similar to one that this Court identified in *Williams v. Taylor*, 529 U.S. 362 (2000). In that case, the Virginia Supreme Court examined mitigation evidence offered at the

habeas hearing, but it did not examine that evidence in light of all of the available mitigating evidence. This Court found that the state court's "prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence -- both that adduced at trial, and the evidence adduced in the habeas proceeding in reweighing it against the evidence in aggravation." *Id.* at 397-8 (citing *Clemons v. Mississippi*, 494 U.S. 738, 751-52 (1990).

In its brief in opposition, Respondent does not address this error, even though it was fully argued in Harris's petition. Instead, Respondent conducts its own purported balancing of the relative weight of the mitigating and aggravating evidence. In its argument, however, Respondent commits the same error as the Fifth Circuit – it completely omits a discussion of the facts and circumstances of Harris's crime or any real analysis of the evidence actually offered in mitigation at trial.

A proper reweighing of *all* of the evidence in mitigation as mandated by *Williams*, against *all* of the evidence in aggravation, makes clear that counsel's error at the punishment phase was harmful and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. at 694.

In the habeas proceedings, Harris presented mitigating evidence suggesting a reasonable probability that a jury would have made a non-death determination in his case. Harris produced several affidavits of non-family members who describe the emotional abuse he suffered from his father, the effect of his closest brother's sudden death at age four, the trauma of being blamed by his father for the death, the stigma associated with childhood rumors of being gay, as

well as being homosexually gang raped when he was thirteen years old, having suffered repeated brain injuries requiring hospitalization, and serious substance and alcohol abuse since his early teens. In addition to this enumeration of the mitigation evidence presented post-conviction, there was evidence that Harris's prison record showed steady improvement and that he had received several commendations during a prior imprisonment.

At trial, Harris introduced mitigating evidence including his youth at the time of the offense, his status as a severe alcoholic, his cooperation with the police, his intoxication at the time of the crime, his intoxication during all of the prior extraneous offenses offered by the State at punishment, his genuine remorse and his sincere efforts to overcome his alcoholism and drug addiction.

In an effort to avoid conducting the necessary balancing, Respondent makes two arguments: first, that the witnesses proffered at the habeas hearing would have been subject to cross-examination, and second, that the information regarding Harris's prison behavior was mixed. In support of the first argument, Respondent points to no significant aggravating evidence that might have been elicited during cross-examination that was not already in the record.[1] Respondent's argument regarding Harris's prison record is

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[1] Respondent contends that additional aggravating evidence could have been elicited from these witnesses, to "reveal that Harris was even more dangerous than he already appeared." Specifically, Respondent refers to purported evidence of an incident in which a fifteen-year-old Harris allegedly "stole" his parents' car – hardly evidence that Harris was more "dangerous" than he appeared. Respondent also refers to evidence that Harris burglarized houses in the neighborhood, but evidence of neighborhood burglaries was presented to the jury during the punishment phase.

similarly unavailing. This Court recognized in *Williams* that all the additional evidence offered need not be favorable to the petitioner to support a finding of prejudice. *Williams*, 529 U.S. at 396. Furthermore, Respondent acknowledges that Harris's jury was informed of the most serious negative aspects of his prison record. Respondent's Brief in Opposition at 11. Thus, it was crucial that the jury be informed of the favorable aspects of Harris's stay in prison.

Given that the Respondent's general challenges to Harris's mitigating evidence are unavailing, the issue is whether the mitigating evidence would have made a difference in the jury's sentencing determination. To evaluate that issue, the relative strengths of the evidence in aggravation must be compared to the evidence in mitigation. *Williams*, 529 U.S. at 397.

As set forth above, the available evidence in mitigation of Harris's sentence was quite extensive. In contrast, the evidence in aggravation was relatively weak. Most significantly (although not even considered by the Fifth Circuit), the circumstances of Harris's offense were not particularly brutal when compared to other cases, including *Williams*. The allegations against Harris involved the abduction of a woman, but it is undisputed that Harris abandoned the abduction and did not physically harm the woman in any way, despite the possibility that she could be a witness against him. As to the killing of Mays, the evidence is again undisputed that Harris did not shoot Mays until Mays fired first and until after Harris had been seriously wounded. In contrast, Williams killed an unarmed, defenseless, intoxicated man, leaving him "grasping for breath." *Williams*, 529 U.S. at 368.

Harris's prior criminal record is much less extensive than that of Williams. In *Williams*, the prosecution

introduced written confessions, including one in which he confessed to attacking an elderly woman leaving her in a vegetative state from which she was not expected to recover. The evidence in mitigation was quite similar to Harris's case, except that the parental abuse was somewhat more acute in Williams's case.

This Court in *Williams* conducted a balancing of all of the evidence in mitigation against that in aggravation and found that counsel's failure to introduce the mitigating evidence prejudiced Williams within the meaning of *Strickland*. In this case, by contrast, the Fifth Circuit did not conduct the required balancing. As it did in *Banks*, the Fifth Circuit in this case simply reviewed some of the mitigating evidence without looking at the record as a whole to determine whether counsel's errors were prejudicial.

Had the Fifth Circuit conducted the required balancing, it would have been forced to conclude that Harris was prejudiced by his counsel's errors. A comparison of the evidence in this case to the evidence in *Williams* makes clear that counsel's failure to introduce significant available evidence in mitigation of Harris's sentence deprived Harris of "a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687.

C. Respondent ignores trial counsel's crucial error of relying solely on a strategy that was unsupported by the law.

Respondent takes issue with the district court's finding that Harris's trial counsel's performance was deficient.[2]

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[2] The Fifth Circuit assumed that the finding of deficient performance was valid and based its holding on a determination that counsel's deficient performance had not prejudiced Harris. *Harris*, 313 F.3d at 243.

Respondent challenges the finding on both procedural and substantive grounds. First, Respondent contends that the district court erred in finding that Harris had overcome the presumption of correctness enjoyed by the state-court fact finding that counsel's performance was reasonable. Second, Respondent argues that Harris's counsel's performance was not deficient because "'the decision as to what evidence to produce or not present at trial was made intentionally, knowingly and voluntarily by [Harris]'" Respondent's Brief in Opposition at 16 (quoting state habeas court's fact findings). In her arguments, Respondent ignores counsel's critical mistake: relying solely on a defense strategy that was legally unavailable.

A presumption of correctness applies to any background factual findings by the state court. *See Perillo v. Johnson*, 79 F.3d 441, 446 (5th Cir. 1996). But, that presumption is overcome when the fact findings are "not fairly supported by the record," 28 U.S.C. § 2254(d)(8) (later amended by 28 U.S.C. § 2254(d) (Supp. 1997) ("AEDPA"))[3], or when the petitioner establishes by "convincing evidence" that they are erroneous. *Self v. Collins*, 973 F.2d 1198, 1204 (5th Cir. 1992). The fact findings at issue here are not fairly supported by the record, and Harris established by convincing evidence that they were error.

Contrary to Respondent's arguments, the presumption does not protect the state habeas court's determinations that "[a]ll matters were fully and completely conveyed to and discussed with [Harris]" or that "the decision as to what evidence to produce or not present at trial was made intentionally, knowingly and voluntarily by [Harris]." The

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[3] The State and Harris agree that the prior version of 28 U.S.C. § 2254(d) applies in this case. *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997).

record does not fairly support either of these conclusions, and Harris presented convincing evidence at the evidentiary hearing demonstrating that they were error.

Harris's counsel attempted to explain their failure to present evidence in mitigation by contending that Harris had instructed them to focus solely on defending at the guilt-innocence phase of the trial and to present no evidence at the punishment phase. The sole defensive strategy at the guilt-innocence phase was to convince the jury that because Harris fired at Mays only after Harris himself had been wounded Harris was guilty of the lesser-included offense of voluntary manslaughter and not of murder. On direct appeal, however, the Texas Court of Criminal Appeals held that Harris was not even entitled to an instruction regarding voluntary manslaughter. *Harris v. State*, 784 S.W.2d 5, 10 (Tex. Crim. App. 1989).

In other words, according to the highest criminal court in Texas, Harris's purported "strategy" for the trial – to focus on the guilt-innocence phase and get a voluntary manslaughter verdict – was foreclosed as a matter of law. Effective trial counsel should have realized and informed Harris that Harris's purported strategy to focus on the guilt-innocence phase was not likely to succeed. But, counsel never informed Harris that his guilt-innocence "strategy" was legally defective.

Thus, the state court's fact finding that Harris's "decision" regarding the punishment phase was informed is not fairly supported by the record. Had Harris's counsel informed him of the significant risk that his ***only*** guilt-innocence defense was legally foreclosed, his view of the appropriate strategy for the punishment phase would likely have been very different. Even assuming that blind deference to the client's alleged directive to forego

development of mitigating evidence could ever constitute effective assistance, it surely cannot when counsel has either failed to realize, or failed to inform the client, that the client's only defensive theory at the guilt-innocence phase may be unavailable as a matter of law.

The state habeas court's conclusion that Harris himself was responsible for counsel's decision to forego virtually all available mitigating evidence is also unsupported by the record and overcome by convincing evidence. As the district court properly found, Harris's counsel did not even comply with Harris's alleged directives. In fact, Harris's counsel conceded in his testimony that he "circumvented" Harris's instructions when he put on witnesses during the punishment phase of the trial:

Q: So, when there were matters that you thought were sufficiently important with respect to the punishment phase, you felt free to violate your client's instructions?

A: I felt like there were things I could do without any help from David and I tried to do those. Yes, I was circumventing what he told us.

6 R 185. Accordingly, Harris's counsel's decision to forego investigation and presentation of a full case in mitigation was not based on Harris's purported instructions.

Furthermore, the district court properly found that Harris's counsel's performance relative to the punishment phase of his trial was deficient. Even assuming that Harris instructed his counsel to present no evidence in mitigation, such an instruction does not by itself protect counsel's performance from scrutiny. Any decision to forgo presentation of mitigating evidence must be both informed and strategic, since mitigating evidence rises to a constitutionally important level in determining whether the

death penalty is appropriate under an individualized sentencing determination. *Woodson v. North Carolina*, 428 U.S. 280 (1976). A number of circuits have recognized that a defendant's instructions do not necessarily relieve counsel of the duty to investigate and present mitigating evidence. *See Karis v. Calderon*, 283 F.3d 1117, 1136 (9th Cir. 2002); *Silva v. Woodford*, 279 F.3d 825, 838 (9th Cir. 2002); *Coleman v. Mitchell*, 268 F.3d 417, 447-48 (6th Cir. 2001); *Battenfield v. Gibson*, 236 F.3d 1215, 1233 (10th Cir. 2001).

Additionally, Harris's counsel was deficient in failing sufficiently to inform him regarding the necessity of mitigating evidence and the potential impact of failing to present such evidence before acceding to his alleged demand that no mitigating evidence be presented. Harris was neither informed of trial counsel's decision nor of the crucial importance such a choice portended for sentencing. "Strategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgments support the limitations on investigation." *Moore v. Johnson*, 194 F.3d 586, 592 (5th Cir. 1999). Harris explained that, if anything, the decision not to present a case in mitigation was not properly weighed by him, since counsel did not explain its significance.[4] Harris also reiterated that "conversations regarding the penalty phase of the trial were virtually nonexistent." 5 R 94.

Stripped of its cloak of so-called "strategy," the performance of Harris's counsel at the punishment phase

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[4] Harris testified at the evidentiary hearing as follows: "And counsel never told me, 'Well, we have this,' or "Your brother can say this,' or 'Your aunt can say this.' He never told me anything like that." 5 R 98. Harris also testified that "[counsel] never got into any specifics of why he thought [Harris's mother] should take the stand or anything else." *See id.*

amounted to abandonment of their client. Harris's attorneys wholly failed to investigate Harris's childhood and background and failed to provide any compelling evidence to the jury that Harris should not be put to death. They failed to undertake this very important aspect of Harris's defense, despite that even a minimal effort would have revealed ample mitigating evidence and despite that there was much Harris's counsel did not know about Harris's background. 6 R 177.

D. The third special issue conflicts with the jury's failure to find voluntary manslaughter.

Respondent argues that the third special issue asks a different question from that asked by the voluntary manslaughter charge. She relies on the construction given by Texas courts to the third special issue that she claims permits "jury consideration of evidence of provocation that, while mitigating, would not support a claim of self defense or voluntary manslaughter at the guilt-innocence phase." Respondent's Brief on the Merits at 26. Respondent's argument does not address the problem, however. Regardless of the way Texas courts have construed the third special issue, the ***jury*** receives no information on that construction. In fact, Texas's highest criminal court has recognized that a "literal" reading of the third special issue would make it applicable only to those situations in which the offense is voluntary manslaughter and not capital murder. *Evans v. State*, 601 S.W.2d 943, 946 (Tex. Crim. App. 1980).

The jury is given no reason not to read the third special issue "literally." The third special issue is asked without additional instruction. The jury cannot possibly be presumed to understand that there is a difference between the manslaughter submission and the third special issue. The

jury is certainly not informed that evidence sufficient to support a "no" answer to special issue number three need not be sufficient to support a "yes" answer to voluntary manslaughter.

Respondent contends that any jury confusion on this topic was ameliorated by defense counsel's argument that a guilty verdict did not require a "yes" answer to question number three. There are at least two problems with this contention. First, defense counsel's argument, which Respondent quotes in her brief, is not sufficiently specific to address the problem. While counsel did argue that the guilty verdict did not answer the third special issue, he did not explain that the evidentiary standard for the two questions is different. He did not provide the jury with any way to reconcile a "no" answer to the third special issue with their rejection of the voluntary manslaughter question.

Second, the prosecution's closing argument implied that the jury had already decided the third special issue:

> They [defense counsel] still want to say, "Let's narrow it down. Please, please, please, don't hold David Harris accountable for anything, except shooting back. The gunbattle was over, with this shot in Mark Mays' arm. You knew that when you disregarded the Voluntary Manslaughter Charge, last Thursday.

This argument plainly suggests that the jury need not consider the third special issue because it had already decided the question. The prosecution's argument made explicit the flaw in the third special issue.

The third special issue did not provide the jury with an avenue through which to give effect to the mitigating impact of the evidence that Mays shot Harris first. To credit

Respondent's argument concerning Texas case law would require a determination that the jury did not in fact follow the instructions. A reviewing court is not permitted to rely on such a determination. *Penry v. Johnson*, 532 U.S. 782, 799 (2001).

CONCLUSION

For the foregoing reasons and for the reasons set forth in the petition for writ of *certiorari*, Petitioner David Ray Harris respectfully requests that the Court grant the petition. Alternatively, Harris requests that the Court stay consideration of this petition pending resolution of *Wiggins v. Corcoran*, 288 F.3d 629 (4th Cir. 2002), *cert. granted*, 123 S.Ct. 556 (2002) (No. 02-311) and *Banks v. Cockrell*, No. 01-40058 (5th Cir. 2002) (unpublished opinion), *cert. granted*, 123 S. Ct. 1784 (2003) (No. 02-8286) (April 21, 2003).

Respectfully submitted

Nickens, Keeton, Lawless,
Farrell & Flack, L.L.P.
Thomas M. Farrell*
* *Counsel of Record*
600 Travis, Suite 7500
Houston, Texas 77002
(713) 571-9191

Andrews & Kurth L.L.P.
Solace Kirkland Southwick
600 Travis Street, Suite 4200
Houston, Texas 77002
(713) 220-4200

Attorneys for Petitioner,
David Ray Harris

Dated: May 29, 2003